

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY GROSS,

Plaintiff-Appellant,

V

PHILIP GARY LANDIN, WEST BLOOMFIELD
TOWNSHIP, WATER & SEWER
DEPARTMENT,

Defendants-Appellees.

UNPUBLISHED

August 26, 2004

No. 246282

Oakland Circuit Court

LC No. 02-038836-NI

Before: Owens, P.J., and Kelly and Gribbs*, JJ.

KELLY, J. (*dissenting*).

I respectfully dissent. I would affirm the trial court's dismissal of plaintiff's action, but on grounds of res judicata, not collateral estoppel.

Res judicata "bars a subsequent action between the same parties when the evidence or essential facts are identical." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). For res judicata to apply, three requirements must be met: 1) the prior action must have been decided on the merits; 2) the issues raised in the second action must have been resolved in the first action; and 3) both actions must have involved the same parties or their privies. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999); see also *Limbach v Oakland Co Bd of Rd Commssr's*, 226 Mich App 389, 395-396; 573 NW2d 336 (1997). Res judicata has been construed "as applying both to claims actually raised in the prior action and to 'every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not.'" *Id.* at 396, quoting *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

The requirements for application of res judicata were met. The first action resulted in a stipulated order to dismiss with prejudice. "A voluntary dismissal with prejudice acts as res judicata with respect to all claims that could have been raised in the first action." *Limbach, supra* at 395-396. The claims Gross asserted against Landin in the second action had been either

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

raised by Gross as affirmative defenses to Landin's complaint in the first action, or could have been raised by him in the first action.¹ The same parties or their privies were involved in both actions; and both actions involved the identical operative facts and occurrence—the March 9, 1999 automobile accident. Res judicata thus barred plaintiff's automobile negligence action against Landin.

Gross asserts that the catastrophic injuries he suffered in the accident rendered him minimally aware of the existence of the first suit, and that his counsel in the first suit (appointed by his insurer) neither kept him apprised of the proceedings nor consulted him regarding discovery. Counsel for the insurer responded to requests for admissions that Gross was the sole proximate cause of the accident, and Gross argues the insurer's counsel did so without notifying Gross of the requests for admission, or that such admissions would be made. While I appreciate this argument and sympathize with Gross given the grievous injuries he suffered as a result of the March 1999 accident, the strength of this argument is undercut by the fact that the stipulated-to dismissal of the first action with prejudice occurred more than three years after the accident, on June 29, 2002, and occurred after the instant action was filed by Gross' independently retained counsel. Moreover, Gross' counsel in the instant action could have moved to consolidate the two actions before the first action was voluntarily dismissed.

I would affirm the trial court because it reached the right result, albeit for a different reason. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

/s/ Kirsten Frank Kelly

¹ While the majority is correct that *Salem Industries v Mooney Process Equipment Co.*, 175 Mich App 213; 437 NW2d 641 (1988) permits a defendant to assert a counterclaim in a separate action under certain circumstances, none of those circumstances are present here. In the instant case, unlike in *Salem Industries*, *supra*, Gross asserted as affirmative defenses that Landin was negligent or comparatively negligent and that Landin did not meet the no-fault serious impairment or permanent disfigurement requirement. However, Gross did not file a motion in the first action for leave to assert counterclaim(s) against Landin, and the first action was dismissed with prejudice by the parties' stipulation. Thus, Gross was not entitled to maintain that Landin was negligent or did not suffer a serious impairment of a body function or permanent disfigurement in a separate independent action.